SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ANTHONY JOSEPH PETRILLI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet reported, but will be found annexed to the transcript of the record, page 103.

JURISDICTION.

The opinion of the Circuit Court was rendered on July 8, 1942. On July 21, 1942, an order was entered staying the mandate of the Circuit Court of Appeals for the purpose of permitting the within application for a writ of certiorari.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATEMENT OF CASE.

The statement of the case is contained in the petition.

SPECIFICATIONS OF ERROR.

I.

The petitioner did not receive a fair trial, because the Government read twenty-eight aliases to the jury and then failed to offer proof as to a single one of them.

United States v. Salowitz, 99 F. (2nd) 714;
D'Allessandro v. U. S., 90 F. (2nd) 640.

II.

The evidence is insufficient to sustain conviction.

Pearlman v. U. S., 10 F. (2nd) 460;
Forte v. U. S., 94 F. (2nd) 236;
Brady v. U. S., 24 F. (2nd) 399;
Van Gorder v. U. S., 21 F. (2nd) 939;
Isbell v. U. S., 227 F. 788.

III.

The proof does not follow the allegations. There is a variance between allegation and proof. The indictment sets forth and describes in particularity sixty-one items, but no proof in particularity was made.

U. S. v. Howard, 3 Summ. 12, 14, 15;
Kutler v. U. S., 79 F. (2nd) 440.

IV.

The proof failed to show that the defendant possessed the alleged stolen property.

Willsman v. U. S., 286 F. 582.

V.

There was no proof that the jewelry found in St. Louis County had a fair market value of five thousand dollars in Texas.

VI.

The Court erroneously charged that the evidence showed the defendant was in possession of the stolen property.

Willsman v. U. S., 286 F. 582.

VII.

The sentence pronounced by the Court is void.

Title 18, U. S. C. A., Section 551.

VIII.

The Circuit Court of Appeals' decision did not fully consider the issues raised.

ARGUMENT.

1.

The Petitioner Did Not Receive a Fair Trial, Because the Government Read Twenty-Eight Aliases to the Jury and Then Failed to Offer Proof as to a Single One of Them.

The petitioner was practically convicted before a word of testimony was adduced, because the Government, in order to prejudice the jury against appellant, read a list of twenty-eight aliases. Appellant objected (R. 15) and warned the Court that such was objectionable, but when the Government counsel said to the Court, "WE ARE GOING TO PROVE THESE ALIASES," the Court permitted counsel to proceed. The Government closed without proving a single one of the aliases. Such prejudicial tactics ought not to receive the approval of any United States Court. The point is fully raised, objection and warning (R. 15) in appellant's motion for directed verdict (R. 73). We now urge the Court to condemn this unfair practice and set this point at rest in the interest of fair trials. Other courts have condemned this practice and indicated when the point is properly raised that the practice will be denounced.

In United States v. Salowitz, 99 F. (2nd) 714 (1938), the Court commented on the practice of indicting a defendant under aliases as follows:

> "It is also urged that appellant was prejudiced by charging him and his co-defendant under a number of aliases. True, this practice has been criticized by some courts, and, we think, not without merit. Of course, if a person had used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the government proves such aliases, there can be no legitimate com-

plaint. Otherwise, it is not difficult to see how a defendant might be prejudiced before a jury. We do not believe, however, the aliases attached to appellant's co-defendant, under the circumstances shown to exist, could have any harmful effect as to appellant."

Again, in D'Allessandro v. United States, 90 F. (2nd) 640 (1937), the defendant was indicted and tried under a long string of aliases, i. e., Joseph D'Allessandro, alias Joe Reno, etc. The Court held:

> "Another practice which provokes comment is that of loading a defendant with a long list of aliases. This, it is true, may afford protection to a defendant, if called upon to prove former jeopardy. None the less, the string of aliases may be so arranged as to carry the implication that the defendant belongs to the so-called criminal class and thus half convict him as soon as the indictment is disclosed to the jury.
>
> "This appellant, however, cannot be heard to complain either of the form of the indictments or of their having been submitted together to the jury, because he made no appeal to the Court to protect him from the evil consequences which he now charges followed."

The Court will observe, that in the first few minutes of the trial, the prosecution bombed the petitioner with poisonous allegations it was not prepared to prove, except by the naive method supplied de hors the record and repeated by the Court at R. 110. It seems that both learned prosecutor and the august Court have completely forgotten the spirit and the letter of the commandment that "Nor shall he be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law" (Fifth amendment). The Court's statement of how and what the prosecutor (R. 110) said he had expected to

prove, justifies the inference that there was deliberate intent to prejudice the defendant, because he must have known that a defendant is not required to take the stand and, in most cases, never does.

The statement of the Court (R. 108) as to the state of mind of defendant is not a cogent reason for denying the petitioner his liberty and is flatly contradicted by the record at page 84:

> "While the Court undertook, in so far as it was possible for it to do so, to withdraw from consideration of the jury the allegation of the aliases, we believe that this is impossible to do, since the United States Attorney persisted in reading those; therefore, the poison being in, it cannot effectively be removed, and that the defendant has been **prejudiced by this unfair method** pursued by the United States Attorney, and for these reasons we now request the Court to refuse to let the indictment go to the jury, **because it contains those prejudicial matters.**"

The whole atmosphere of the trial of this case was deliberately surcharged with passion and prejudice by the prosecution, from beginning to end. Beginning with the reading of the aliases and ending with the prosecutor shouting "gangster" to the jury in his closing argument (R. 76):

> "Mr. Robinson: You men know why that statute was passed. We didn't have any highways and high-powered automobiles during the time of our forefathers. The purpose of that statute, and you men know what the purpose was, is to stop gangsters, like these men were, who are robbing men on the highway and transporting the property taken——"

The Circuit Court of Appeals refused to consider this assignment of error and dismisses it at Record 107 with the statement, "There is no occasion to go on spelling out

inescapable answers to patent propositions." We feel certain that judicial interpretation must consider every phase of a case, and that if the Court had considered this prejudicial statement in connection with the reading of the alleged aliases, the failure to prove them, that then it could not have asserted that there was no prejudice in the trial of this case. Liberty is too precious to be given such short shrift.

2.

The Evidence Is Insufficient to Sustain Conviction.

The opinion reveals misstatements of facts and even the mention of facts not in the record. For instance, at Record 104, "Appellant was apprehended a short time later." There is not a single word in the record that shows appellant was arrested a short time after the ambulance left the scene of the accident, or, for that matter, any other time. The only hint in the record as to when petitioner might have been arrested is at Record 9, when he applied for a bond on October 1, 1941, which is about twenty-one months after February 8, 1940, the date alleged in the indictment (R. 5) as being the date of the alleged crime.

At Record 104: "Slifkin's brief case with the jewelry was found in the car, and he duly made an identification of all of the articles at the office of the highway patrol on the following day." The record nowhere shows that Slifkin made the identification on the following day.

The Government did not prove in particularity what jewelry was stolen in Texas or what jewelry was found in the Minnesota car.

At Record 106:

> "In addition, he had previously described generally the character of the articles stolen, and he had further produced a detailed list of the sixty-one several items, which he had prepared and was carrying with him as a personal inventory at the time of the robbery, and

> which was made available to appellant's counsel for purposes of comparison and cross-examination."

This Court will see, at Record 19, that the memorandum was never identified or introduced in the evidence, and that the question was withdrawn by the prosecution.

A careful and accurate reading of the record shows, in the first place, there was no proof of the corpus delicti.

Our brief below was either not clear or the Court misconstrues the definition of "corpus delicti," as the Circuit Court seems to be of the opinion (R. 106) that the alleged stolen jewelry was the corpus delicti.

In the case of Pearlman v. United States, 10 F. (2nd) 460, under the Dyer Act, it was indicated that the corpus delicti there is the transporting of a stolen automobile across state lines with the knowledge that it is a stolen car.

Hence it will be seen that the knowledge of the stolen character of the goods at the time of their transportation is really the corpus delicti. Hence, the absence of proof that the accused was at the scene of the robbery deprives the Government of a very necessary point of proof which it would seem could only be supplied by the defendant's confession. There was no confession in this case. In the Pearlman case it was easy enough for the Government to show that the automobile was stolen property. However, it was very difficult for it to show that Pearlman had stolen the car or knew it was stolen, and, while the Court held it was most necessary, it ruled that the missing link of evidence had been supplied by Pearlman's confession to the police when he said to them, "Well, you have me and that is all there is to it."

Forte v. United States, 94 F. (2nd) 236, contains the best definition of corpus delicti in transportation cases (l. c. 243):

> "In the instant case the corpus delicti is transportation of the vehicle in interstate commerce from the District of Columbia to Maryland knowing it was

stolen. The contention of the Government that the scienter is not a necessary element of the corpus delicti cannot be sustained. There is nothing criminal under the statute about transporting a vehicle across state lines unless the person transporting it knows it to be stolen. The law is well settled that the corpus delicti includes not only the body or fact of the wrong, in the sense of the death in homicide or the loss of the chattel in larceny, but also the criminal means by which the same came about. See 4 Wigmore, Evidence (2d Ed., 1923), Section 2072, where the learned author, first expressing the personal view that the term corpus delicti ought to be taken to include only the first element, the fact of the injury or loss, and not the second, the criminality which is the source of the loss, nevertheless concedes that 'by most judges the term is made to include the second element also.' "

The record is most inconclusive as to what jewelry was actually stolen in Texas. The method of proving the allegation of the indictment by the indictment itself is certainly violative of every rule of law and reason and permits the witness to invade the province of the jury.

This case is devoid of any proof that the property described in the indictment was carried across any state line. The Ford car was not shown by any testimony to have been in any place other than St. Louis County, Missouri. The proof wholly fails to show that appellant transported either the jewelry described in the indictment or the jewelry found in a wrecked automobile at the intersection of U. S. Highway No. 66 and Laclede Station road.

The Government predicates its whole case on the fact that appellant was found in a dazed condition twenty-five yards (seventy-five feet) away from the wrecked automobile. No witness could or would say appellant was in the Ford car.

From this one circumstance, which is just as consistent with innocence as guilt, the jury had to presume there had been a robbery of the particular jewelry described in in-

dictment in Texas; then the jury had to presume that the jewelry found in St. Louis County was that same jewelry taken in the robbery in Texas; and then the jury had to presume on these—presumption upon presumption—that defendant knew of the robbery in Texas and thereafter caused the jewelry to be transported across state lines.

> "It is well settled that presumptions cannot be based upon presumptions." Brady v. United States, 24 F. (2nd) (C. C. A. 8) 399, l. c. 404.

There are a number of obvious explanations for appellant being found dazed off the roadway and seventy-five feet away from the wrecked car, and this circumstance is not sufficient to overcome the presumption of innocence—this fact is not inconsistent with his innocence.

In Van Gorder v. U. S. (1927, C. C. A. 8), 21 F. (2d) 939, wherein the defendant was convicted of stealing two post office keys and wherein the only evidence against him was the possession of the said keys, the Court made the following comments on the sufficiency of circumstantial evidence:

> "In order to sustain a conviction of a crime on circumstantial evidence it must be such as to exclude every reasonable hypothesis but that of guilt of the accused; the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124. The Circuit Court of Appeals of the Second Circuit in Norowitz v. U. S., 282 F. 575, 579, declared that: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiff in error.' To the same effect are * * *.
>
> "The evidence in this case utterly failed to exclude every other hypothesis but that of guilt. The hypoth-

esis that one of the clerks in the post office who was present there in the morning of January 17, 1924, picked up the keys which the substitute letter carrier had left lying on the table outside the money order department, dropped or laid them elsewhere, whence they had been transferred by him or others until they had come to the possession of the defendant, the hypothesis that some thief had stolen them, then lost them, and the defendant had innocently found them, or that in many other ways without the theft of the defendant they had come to his possession, is under all the evidence, more probable in the face of the legal presumption of the defendant's innocence and the requirement that his guilt be proved by the Government beyond a reasonable doubt before his conviction, than the hypothesis that he was guilty of this crime."

In Isbell v. U. S., 227 F. 788 (8 Cir., 1915), the Court went to great length to explain the following rule:

> "Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, **and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.**" (Emphasis ours.)

3.

The Proof Does Not Follow the Allegations. There Is a Variance Between Allegation and Proof. The Indictment Sets Forth and Describes in Particularity Sixty-One (61) Items, But No Proof in Particularity Was Made.

This indictment sets forth sixty-one (61) articles of jewelry with particular descriptions. The proof failed to describe the articles in particularity. The Circuit

Court, in effect, said that with what particularity the proof must follow the allegations might be a question when properly raised. The proposition was properly raised (R. 72) both by motions for directed verdict and in exceptions (R. 83) and the point was squarely before the Court, but the opinion here (R. 106) seeks to shift the burden to petitioner to supply by cross-examination that which the prosecution has failed to prove. It is elementary that the prosecution must first support the allegations of the indictment.

There can be no question that, from the standpoint of jeopardy, fair trial and plain justice, when the indictment describes with particularity, that the proof must follow the allegations. Allegata et probata.

Numerous decisions are found for the proposition that when a person, place or thing, necessary to be alleged, is described more particularly than is necessary, the allegation must be proved, because such words are requisite to the identity of that which is legally essential.

Within this class, opinions are legion which show that a description of money as silver or gold certificates, current money, merchandise, etc., are matters of description within the exception.

In the case of United States v. Howard, 3 Summ. 12, 14, 15, we find the first application of the exception in the federal courts. Therein Justice Story said as dicta:

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can be rejected as surplusage. * * *"
>
> "On the other hand, if a man should be charged with stealing a black horse, the allegation of color, although unnecessary, yet, being descriptive of that which is material, could not be rejected as surplusage. 2 Russ. Crimes 706. So upon an indictment for stealing live tame turkeys, the description of live could

not be rejected as surplusage, and proof of stealing dead turkeys would not support the indictment. That was so held in Rex v. Edwards, Russ. & R. 497."

In the recent 1935 Circuit Court of Appeals case of Kutler v. U. S., 79 F. (2nd) 440 (C. C. A. 3 Pa.), the Court, in the course of the opinion, said:

"Where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule is that it must be proved as laid, even though such particularity of description was unnecessary. Trice v. State, 116 Ga. 602, 42 S. W. 1008; U. S. v. Howard, 26 Fed. Case 388, No. 15,403; State v. Lashus, 67 Me. 564; State v. Langley, 34 N. H. 529; Commonwealth v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652. In the case at bar the word 'receiver' describes John M. Hill and such description was essential. It was accordingly necessary for the Government to prove it, but the evidence showed that the description was false and the variance was fatal."

4.

The Proof Failed to Show That the Defendant Possessed the Alleged Stolen Property.

It is crystal clear that the witness testified that appellant was never seen in the wrecked car—the nearest he is ever placed to it is 75 feet away in a filling station driveway in a dazed condition. Some jewelry was found in the automobile. Whether it was jewelry taken in Texas is doubtful and not clearly proven by competent evidence. Such facts do not warrant the assumption that appellant was in possession of the stolen jewelry or any jewelry, and the law will not permit the jury to ignore the presumption of innocence by the inference which arises from the possession of recently stolen property. POSSESSION MUST BE PERSONAL AND EXCLU-

SIVE. APPELLANT WAS NOT SHOWN TO POSSESS THE JEWELRY.

> "The general rule is that possession, to be incriminating, must be personal and exclusive." Willsman v. U. S., 286 F. 582.

The presumption of possession of recently stolen property does not and could not possibly apply to the facts in this case, because the evidence fails to show that the petitioner was in the automobile or that he transported the jewelry from the State of Texas to the State of Missouri. Even if petitioner had been shown by direct evidence to have been in the car, the evidence would still be insufficient to convict petitioner, because the proof in the case does not show that petitioner was in the State of Texas or carried the jewelry described in the indictment across any state line, or that he had knowledge of such transportation. To reach such a conclusion, it is necessary to pyramid presumptions: (1) It must be presumed that he was in Texas; (2) that he had knowledge that the jewelry described in the indictment was stolen in Texas, and (3) that he transported it across state lines. In the evidence as it stands there is none to show that he was present in Texas or that he had any knowledge that the jewelry described in the indictment was stolen and transported across state lines.

The Circuit Court of Appeals ignores the rule of law that there must be substantial evidence which excludes every other hypothesis but that of guilt in order to convict on circumstantial evidence, by ruling at record 104, that the jewelry here was stolen in Texas and transported to Missouri, and assumes outside the record that it was possible to reach Missouri in the time elapsing between 2:15 p. m. one day and 5:30 a. m. the next; that the Minnesota Ford did such; and that the petitioner was in that car, when the record shows that no witness would say peti-

tioner was in the car and against the fact that he was found seventy-five feet away from the car off the road in a filling station lot. He might have been there from any number of reasons or causes other than that assumed by the Court.

5.

There Was No Proof That the Jewelry Found in St. Louis County Had a Fair Market Value of $5,000.00 in Texas.

The proof of the value of the jewelry is cloudy. We submit that cross-examination of witness Hoeman (R. 62) shows that he was no expert at all. **Furthermore, the Government's failure to produce the jewelry at the trial deprived appellant of the right to have jewelry appraised by a qualified and disinterested expert.** No proof was offered to show the value in Texas of the property found in St. Louis County, or that described in the indictment. The Eighth Circuit Court of Appeals held, in Husten v. U. S., 95 Fed. (2) 440, that the value of stolen property is the market value at the time and **place** of taking.

6.

The Court Erroneously Charged That the Evidence Showed the Defendant Was in Possession of the Stolen Property.

The Court's charge (R. 82) injected another unauthorized and prejudicial factor in the case when the Court charged:

> "There is evidence in this case to the effect that the jewelry in question was stolen. In this connection the jury is entitled to consider as a circumstance in the case the fact, if you believe it to be a fact, that the jewelry was shortly thereafter in the possession of the defendant."

There was no evidence that the defendant was ever in possession of a single piece of the alleged stolen jewelry or any other jewelry; therefore the Court tried to draw an inference from the thin air, not from any fact in the case, and thereby misled the jury into thinking that matters not in the record were circumstances in the case. **There was not even any competent evidence that the jewelry described in indictment was stolen.**

The Court, after exception by appellant, realized its error and undertook to withdraw this prejudicial charge from the jury (R. 84). Unfortunately poison cannot be withdrawn from the veins of a lawsuit by any such simple expedient. Jurors heed what they first hear.

The mere fact that jewelry was found in a wrecked car occupied by two men seventy-five feet from where appellant was found injured raises no presumption of possession on his part.

In the case of Willsman v. United States, 286 F. 852 (8 Cir.), the Court said:

> "The general rule is that possession, to be incriminating, must be personal and exclusive."

Thus we see the case is replete with instances and incidents which plainly militated against a fair trial. First, the prosecutor read a long list of aliases to create an unfavorable impression; then he followed this up by calling the petitioner a gangster; then the Court misstated the evidence (R. 82), and finally, at record page 79, attempts to condone the mistake of the prosecution by instructing the jury to forget that it had heard the prosecutor read aliases and solemnly assure the Court he would prove them; forget that the prosecutor called the petitioner a gangster, and forget that the Court misstated the evidence. The minds of laymen are too frail to hear so much prejudicial matter and forget it. How could the jury

forget any of these things when their minds had been inflamed by tactics which charge the court room with prejudice?

7.

The Sentence Pronounced by the Court Is Void.

Finally, the Circuit Court of Appeals refused to consider assignment No. 7, which was stated and argued in our brief below:

> The sentence pronounced by the court is void because the court charged the jury as if appellant were an accessory after the fact; then, after verdict of "guilty" imposed maximum sentence, when section 551, title 18, requires that sentence be only half of maximum.

The Court, apparently realizing that the evidence failed to show appellant at the scene of the Texas robbery, and did not show appellant carried any stolen property across state lines, and failed to place defendant in the automobile where some jewelry was found, apparently concluded that appellant might be an accessory after the fact. At any rate, the Court gave the following charge (R. 82):

> "Another point should be called to your attention and that is based upon a federal statute. The statute, in effect, provides that there is no distinction as between the guilt of a principal and the guilt of an accessory; that one may be charged and prosecuted as a principal, and if it turns out that he is only an accessory he may, nevertheless, be convicted. A principal is one who actually commits a crime. An accessory is one who willfully aids, abets, counsels, or commands the commission of the offense. All persons who act together with a common intent in the commission of a crime are equally guilty, and if two or more persons are so acting together with a common intent and purpose in the joint execution of the plan,

then the act of each one is binding upon the other, and this is true, regardless of whether the others are present or not."

Such a charge, taken in connection with the erroneous charge on circumstantial evidence and erroneous statements concerning possession, as above set out, undoubtedly strongly influenced the finding of the verdict of guilty.

Having given such a charge, the Court was bound to sentence appellant under the provisions of Title 18, U. C. C. A., Section 551:

> "Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years."

The maximum sentence under section 415 is ten years, which the Court imposed, when it should have imposed only five years. Therefore, the sentence as imposed is void.

8.

The Circuit Court of Appeals' Decision Did Not Fully Consider the Issues Raised.

It was error for the Circuit Court of Appeals to refuse to consider petitioner's assignment of error No. 3 at record 96-97; assignment of error No. 4 at record 97-98; assignment of error No. 5 at record 99; assignment of error No. 6 at record 100; assignment of error No. 7 at record 100-101.

The Court's refusal to consider petitioner's assignment of error No. 3, which complained that the Assistant United

States Attorney called the petitioner a "gangster" avoided the necessity of further noticing the prejudicial manner in which this case was tried. However, such procedure condones unfair trial tactics and deprives defendant of liberty without due process of law. This episode throws light on the prejudicial atmosphere, and when all such incidents are added together reveals an unfair trial.

It is the duty of the appellate court to review all points raised in an appeal. To refuse to review all points raised renders the right of appeal futile. In this case one of the primary points was unfair and prejudicial acts by the prosecutor, but, notwithstanding this, the Court is at pains (R. 107) to show that no prejudice existed. It would seem, therefore, that the Court should have passed on assignment No. 3 (R. 96), which complained that Government counsel in argument to the jury referred to defendant as "gangster." The episode in the trial is shown at R. 76. Since the Circuit Court of Appeals failed to pass on all the issues in the case, it would seem that it is the duty of this Honorable Court to grant certiorari to the end that the petitioner's case be fully reviewed.

CONCLUSION.

It is therefore respectfully submitted that, for all the foregoing reasons, the petitioner's application for a writ of certiorari should be allowed as prayed.

Respectfully submitted,

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